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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. IRA GORDON et al., Defendants and Appellants.	C056183 (Super. Ct. No. 04F06813)

Following a joint trial, a single jury convicted codefendants Ira Gordon, Jamaur Denard Wilson, and Justin Wayne Robson of felony murder occurring during a drug-related robbery. Robson, a Caucasian, cooperated with the police and solicited incriminatory custodial statements from his African-American codefendants, who, unlike Robson, were also gang members. He claimed his scary, violent codefendants made him do it. The robbery, according to the prosecution, was not gang related. All three defendants ridicule Robson's lawyer for different reasons. Needless to say, he is part of central casting for this appeal.

Most of the issues on appeal are related to the court's denial of the severance motions and the difficulties that arose throughout the ensuing joint trial as three defendants pursued antagonistic defenses. Despite the formidable challenges presented by the joint trial, we conclude defendants did, in fact, receive a fair trial, and given the overwhelming evidence of guilt, any flaws were harmless beyond a reasonable doubt. We strike their parole revocation fines and in all other respects affirm the judgments for murder with a robbery-murder special circumstance and various enhancements.

FACTS

In August 2004 all three defendants were about 20 years old and unemployed. When they were not involved in criminal enterprises, they filled their days with swimming, playing dice, drinking, smoking marijuana, and popping pills. The women they lived with were the apparent breadwinners. Gordon and Wilson lived with a woman named Takneeca, her infant son, and Gordon's new girlfriend, 17-year-old Amber W. Robson lived with his girlfriend and her children in the same apartment complex. Robson had known Wilson since they were in third grade together and had served time with Gordon in a correctional facility. Gordon and Wilson were very close friends.

The prosecution presented compelling eyewitness testimony about the chronology of events that occurred on the night of August 3. Amber W. testified that after a day of swimming, watching movies, and partying, Wilson, Gordon, and Robson left to go to the liquor store. Many of the young people in the

neighborhood congregated in the parking lot of Ernie's liquor store. About 11:00 p.m., 18-year-old Brad Tarbuskovich arrived in his car with his mechanic friend, Will McGuire. He observed three males standing by a blue car: one 19- or 20-year-old white male with a "scratchy kind of beard" and crew cut, about five feet ten inches tall, wearing a light blue E-NYCE shirt and jeans (Robson); one five feet eight inch or five feet nine inch black male with a gold "grill," dreadlocks, a San Francisco Giants jersey, and a tattoo on his inner left forearm (Wilson); and a second black male, who appeared to be about 20 years old, five feet eight inches or five feet ten inches in height and 160 to 170 pounds, wearing a green beanie (Gordon). Tarbuskovich went into Ernie's to buy an ice cream and a soda, and when he returned the black male with the gold grill was test-driving his car with McGuire.

According to Tarbuskovich, Alvin Richardson, the eventual victim, drove up to Ernie's around 11:40 or 11:45 p.m. His girlfriend, Lakisha Grimes, was riding in the passenger seat. When she went into the store, Tarbuskovich watched one of the black males, later identified as Gordon, approach the passenger-side door and begin talking to Richardson. He eventually got into the rear passenger seat. The white male he identified as Robson got into the rear seat behind the driver. Grimes returned to the car.

Tarbuskovich saw Wilson, who had test-driven his car with McGuire, standing next to the driver's window of Richardson's car, which was halfway open. He heard Gordon say, "You're going

to play me like that?" He watched all three males striking Richardson. Robson pistol-whipped Richardson multiple times and then got out of the car. Grimes ran into the liquor store screaming for someone to call the police.

Meanwhile, Tarbuskovich watched Gordon and Wilson continue to strike Richardson with their fists. He heard two to three gunshots and then saw all three defendants run away. He was "[v]ery confident" of his positive identification of Gordon, Wilson, and Robson during photographic lineups.

Lakisha Grimes's testimony corroborated the account provided by Tarbuskovich, with additional flourishes. She arrived at Ernie's with her boyfriend, Alvin Richardson, and followed him into the store after Wilson approached her car and made unwelcome advances. When she got back into the car, Gordon got into the back seat and asked Richardson if he would give them a ride; Robson then got into the back seat as well. He called to Wilson several times and "kept saying he was waiting on his bro." Grimes refused to give them a ride, which provoked Robson and Gordon, who exited the vehicle. As Robson got out of the car he stated, "[F]uck this bitch and her shit." Gordon pulled out a semiautomatic handgun.

Grimes testified that Gordon told Richardson to give him all his money and everything he had in his pockets. By then, Wilson was at the driver's window, punching Richardson. Grimes ran into the store to call for help. As she returned, it looked like Richardson was trying to get his wallet out of his pocket. She then observed flashes and heard gunshots with each flash.

Gordon remained in the car, and Wilson and Robson were at the driver's window. Robson was holding a gun, pointed at the ground. After the shooting stopped, the three ran away. Richardson died in her arms. She positively identified all three defendants in a photographic lineup shortly thereafter.

Amber W. testified that Wilson and Robson returned to the apartment first, looking "exhausted, kind of tired like they just, I don't know, they just looked like they just did a workout." Gordon arrived five minutes later, also looking exhausted and out of breath. He told Amber W. he could not tell her what had happened. Robson and Wilson went into a back room together, and then Gordon went into a back room with Wilson.

Robson asked Amber W. and her roommate to accompany him to his apartment because "there was hecka helicopters out there and hecka police." As Amber W. was leaving the apartment, she heard Robson tell his girlfriend, "Hide this, hide this, hide this in the safest spot." Robson returned to Amber W.'s apartment about 10 to 15 minutes later. She heard him tell Wilson and Gordon, "I pistol-whipped that nigga first." When she asked, "So you robbed him," Robson said nothing.

Amber W. saw Gordon, Wilson, and Robson splitting some marijuana, money, and pills on the counter. Gordon took about $60 from the split. When she later asked what he had done, Gordon replied that one of them was going to be in the coffin and the other in jail. He later told Amber W. that he had shot someone.

Amber W. testified that she had received threatening phone calls from Gordon. Wilson also called and asked her to lie about what she had seen.

Police investigators found a total of eight baggies of marijuana in the victim's car and three spent .380-caliber Winchester shell cases. In Robson's apartment they found a revolver in a blue purse and a semiautomatic handgun wrapped in a towel, both inside a heater unit. The bullets recovered from the victim's body were fired from the .380-caliber semiautomatic handgun.

A pathologist testified that the victim sustained several blunt force injuries, bruises, and abrasions consistent with being pistol-whipped and being struck by a fist. He also sustained three gunshot wounds to the body, and all three were consistent with the victim's sitting in the driver's seat of the vehicle and being shot from the back seat on the right passenger side.

The prosecution also played tapes of conversations Robson had with each of his codefendants, the subject of which will be discussed as relevant to the issues in which they are pivotal. Gordon ran when confronted by the police, dropping marijuana and Ecstasy pills close by. Robson was arrested, handcuffed, and then escaped. Wilson was apprehended a few days later.

In the face of this mountain of evidence against them, all three defenses were seriously anemic. None of the defendants testified, a particularly dicey strategy for Robson, who was relying on a duress defense. But he had distanced himself from

his friends as soon as he was arrested, volunteering damning information against them before he was even interrogated. Gordon argued false identity. Wilson argued he was not involved in the robbery, was not seen with a gun, and was simply in the wrong place at the wrong time.

All three attempted to discredit the eyewitness testimony. On cross-examination, Tarbuskovich revealed that he was a regular user of marijuana and suffered an attention deficit disorder as a child. He testified he was not under the influence at the time of the shooting. Defense counsel tried to highlight some small discrepancies in the descriptions offered by Tarbuskovich and Grimes.

Robson, not the prosecution, called Will McGuire to testify. He candidly admitted that his memory of the events was "a blur" because he had consumed a large amount of alcohol and had smoked marijuana. He told the police that he saw a black man wearing a white shirt standing by the driver's door, "slap boxing" through the window. The black man had a gun.

Roger Ringkamp, one of Robson's neighbors, also testified on his behalf. Ringkamp is seriously disabled from burns he sustained to 45 percent of his body. He is blind and deaf on his left side. Although he had run out of his prescription for codeine on the night of the shooting, he had taken morphine around 10:00 p.m. He testified that he saw Robson standing by the pizza parlor near Ernie's liquor store at the time he heard the gunshots. After the shots were fired, Robson ran toward their apartments.

Gordon argued that Grimes referred to the black man in the rear seat as Wilson's brother Jamiere. He pointed out that Amber W. testified Gordon did not leave in a green beanie, and Grimes testified the person who got into the rear passenger seat was wearing a black Kangol-brand hat.

The jury returned guilty verdicts on all counts of murder, robbery, and the robbery-murder special circumstance, and found true all the firearm enhancements. Defendants were sentenced to state prison for life without the possibility of parole, plus additional concurrent terms for the enhancements. All three defendants appeal.

DISCUSSION

I

Joint Trial Issues

Joint trials compel compromises. Defendants are dismissive of the strong public policy in this state favoring joint trials and insist that these pragmatic compromises came at the expense of their fundamental rights to a speedy trial, a fair trial, and to present exculpatory evidence. We will examine each of their claims in detail below. But their individual claims must be considered in light of the overarching statutory and judicial preference for joint trials.

Penal Code section 1098 provides, in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly,

unless the court order[s] separate trials."[1] Section 1098 embodies a legislative preference for joint trials. (*People v. Boyde* (1988) 46 Cal.3d 212, 231-232.)

Section 1050.1 puts teeth into the more benign preference expressed in section 1098. Section 1050.1 states: "In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time."

The statutes do not define "good cause" or "reasonable period of time." Both determinations are left to the trial court's exercise of discretion. We review the trial court's decision for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

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[1] All further statutory references are to the Penal Code.

A. Wilson's Right to a Speedy Trial

Wilson contends his fundamental right to a speedy trial was violated under both the federal and state Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The constitutional right under the California Constitution is supplemented by section 1382, whereby a defendant must be brought to trial within 60 days of his arraignment "unless good cause to the contrary is shown." (§ 1382, subd. (a)(2).) There is no dispute that the reason for the repeated continuances was to accommodate the lawyers for Gordon and Robson, either because of a change of counsel or a calendar conflict. The question is not whether there was good cause for the continuances as to these defendants, but whether it is constitutionally permissible to allow the statutory preference for a joint trial to trump Wilson's right to a speedy trial.

Greenberger v. Superior Court (1990) 219 Cal.App.3d 487 (*Greenberger*) speaks to this issue. Ms. Greenberger, like defendant Wilson, argued "the joint trial mandate of section 1098 is not a counterweight to her speedy trial right. Her interest in a statutory speedy trial, she argues, is independent of and immune from any and all interests embodied in section 1098. Section 1098 interests, she asserts, weigh not even a milligram on a defendant's section 1382 scales." (*Greenberger*, at p. 496.) The Second District Court of Appeal rejected Ms. Greenberger's absolutist view of the right to a speedy trial.

Having surveyed a number of cases raising a plethora of issues posited against the preference for a joint trial, the court pointed out "the preference for joint trials encompasses varied and significant interests. So significant, in fact, that they may serve as counterweights to a defendant's right to confront witnesses (*Richardson* v. *Marsh* [(1987) 481 U.S. 200 [95 L.Ed.2d 176]]), his privilege against self-incrimination (*People* v. *Kelly* [(1986) 183 Cal.App.3d 1235]), his right to exclude prejudicial character evidence (*People* v. *Keenan* [(1988) 46 Cal.3d 478]), and others (*People* v. *Turner* [(1984) 37 Cal.3d 302], *People* v. *Lara* [(1967) 67 Cal.2d 365], and *People* v. *Harris* [(1989) 47 Cal.3d 1047])." (*Greenberger*, *supra*, 219 Cal.App.3d at p. 499.)

The court concluded, "[I]f the precipitating cause for trial delay is justifiable, such as codefendants' need to adequately prepare for trial, then the section 1098 joint trial mandate constitutes good cause to delay the trial of an objecting codefendant." (*Greenberger*, *supra*, 219 Cal.App.3d at p. 501, fn. omitted.) Thus, in the appellate court's view, "joint trial interests constitute section 1382 good cause." (*Greenberger*, at p. 499.) The court's conclusion was consistent with a terse comment by the California Supreme Court in *People v. Teale* (1965) 63 Cal.2d 178, that "[w]here a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced." (*Id.* at p. 186.) Thus having answered the abstract question whether the preference for joint trials alone

can satisfy section 1382's mandate for good cause, the court wrestled with whether there was good cause in the case before it to justify the six-month delay suffered by Ms. Greenberger.

The court "found no magic calipers marking the exact reach of good cause delay. In speaking of a defendant's right to a speedy trial the United States Supreme Court has said, '[i]t is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.' (*Barker* v. *Wingo* (1972) 407 U.S. 514, 521 [33 L.Ed.2d 101, 112 . . .].)" Following the guidelines delineated in *Barker v. Wingo* and the societal interests embodied in sections 1098 and 1050, the court engaged in a careful weighing of the justification for a joint trial against the importance of the defendant's fundamental right to a speedy trial. Those guidelines include length of the delay, reason for the delay, the defendant's assertion of his right, and any prejudice to the defendant. (*Greenberger*, *supra*, 219 Cal.App.3d at p. 502, citing *Barker v. Wingo*, *supra*, 407 U.S. at p. 530.)

In *Greenberger*, the trial court expressly considered the competing interests and explained: "'It's clearly a very complex[] case and it seems to me that the period asked for by the other two defendants is very reasonable considering the complexity of the case and what needs to be done. [¶] So I will find that seven [*sic*] months is an appropriate continuance based upon the preparation that needs to be done. [¶] Although I recognize that you are very anxious to go to trial Mr. Shohat

[petitioner's counsel] and the reasons for it as detailed to me in camera, I find that that is outweighed by the need for preparation by the co-defendants and the economy of a joint trial and I think that the prejudice that you lay out is speculative.'" (*Greenberger*, *supra*, 219 Cal.App.3d at p. 504.)

The Court of Appeal found the record supported the trial court's exercise of discretion: the length of the delay was commensurate with the complexity of the case, the seriousness of the capital murder charge, the need to provide the codefendants with competent counsel, the burden on the 26 witnesses and the courts to conduct multiple trials, and the failure of the defendant to identify any tangible prejudice. (*Greenberger*, *supra*, 219 Cal.App.3d at pp. 504-506.)

Indeed, the California Supreme Court has recently reaffirmed these principles. In *People v. Sutton* (2010) 48 Cal.4th 533, the court explained: "[P]ast decisions of this court make it clear that the substantial state interests served by a joint trial properly may support a finding of good cause to continue a codefendant's trial beyond the presumptive statutory period set forth in section 1382. [Citations.] And numerous Court of Appeal decisions properly have applied this general principle. [Citations.] Furthermore, the provisions of section 1050.1 also clearly establish that the state interest in permitting jointly charged defendants to be tried in a single trial *generally* constitutes good cause to continue a defendant's trial to enable that defendant to be tried with a codefendant whose trial properly has been continued to a date beyond the

presumptive statutory deadline. [Fn. omitted.] Accordingly, the decisions in *Sanchez v. Superior Court* [(1982)] 131 Cal.App.3d 884, *People v. Escarcega* [(1986)] 186 Cal.App.3d 379, and *Arroyo v. Superior Court* [(2004)] 119 Cal.App.4th 460, are disapproved to the extent they hold or suggest that the state interests served by a joint trial cannot constitute good cause under section 1382 to continue a codefendant's trial beyond the presumptive statutory deadline." (*Sutton*, at p. 562.)

We accept the notion that the statutory preference for a joint trial may, under certain circumstances, infringe on a defendant's right to a speedy trial as that right has been defined by section 1382. Thus if, as here and in the cases cited above, there is an independent basis for establishing good cause for a continuance, i.e., to allow the codefendants' counsel to prepare for trial, the joint trial mandate may constitute good cause to continue the defendant's trial as well. The difficult question presented here is whether the trial court abused its discretion in continuing the case for 10 to 11-1/2 months to accommodate Robson's and Gordon's lawyers.

As a preliminary factual matter, the parties dispute the length of the delay. Whereas Wilson contends the delay was fifteen months and thereby long enough to trigger a presumption of prejudice (*Doggett v. United States* (1992) 505 U.S. 647, 651-652, 656-657 [120 L.Ed.2d 520]), the Attorney General insists the delay was somewhere between nine months and a year.

The record is clear that Wilson refused to waive time on multiple occasions and the joint trial necessitated a lengthy

delay in starting his trial. But he does exaggerate the length of the delay by suggesting "the length of the delay in this case was over 15 months from the time the information was filed until the case finally went to trial, with [defendant Wilson] objecting to every continuance along the way." In fact, on February 8, 2005, he expressly waived time and agreed to vacate the trial date and reset the matter for a jury trial on May 24, 2005. Moreover, on May 9, 2005, the trial was continued until August 15, and there is no indication in the record whether he waived time. But on July 14, 2005, Gordon's counsel requested yet another continuance and Wilson would not waive time.

If we were to assume, as the Attorney General urges, that Wilson waived time on May 9, 2005, before asserting his objection and refusing to waive on July 14, the length of the delay would be from July 14, 2005, until the start of trial on May 9, 2006, or just under 10 months. A more favorable calculation for Wilson would be to assume he did not waive time on May 9, 2005, in which case the delay would be 12 months. We conclude that the debate over an eight-week swing misses the mark; the dispositive question is not whether the delay was nearly ten months or a year, but whether the trial court abused its discretion by postponing Wilson's trial to allow for a joint trial.

Wilson poses a difficult quandary. The relevant factors amply justify the court's decision to try these three defendants together. All three were involved in the robbery that led to the shooting and death of Richardson. The witnesses are the

same. The severity of the charges, including a special circumstance, favored a joint trial. Separate trials would burden the courts to conduct multiple trials involving the same evidence, the same witnesses, and the same prosecutor. Moreover, the prosecutor resisted the continuances and was ready to proceed to trial, and therefore, the government was not complicit in causing the delay. And the lawyers for Gordon and Robson had compelling reasons to request the continuances.

Wilson insists he suffered prejudice. But he confuses the prejudice he assertedly suffered from the joint trial with the prejudice he suffered as a result of the delay. He does not suggest that memory loss or witness unavailability compromised his ability to have a fair trial. We can find no evidence in the record that he suffered any prejudice due not to the joint trial, but to the delay.

Section 1050.1, as Wilson points out, allows for a continuance without necessitating separate trials if a joint trial can proceed within a "reasonable period of time." Wilson, with ample support from the record, complains that the trial court simply did not exercise its discretion to determine whether the delay was reasonable. In Wilson's view, the court did not appear to understand it had any discretion to exercise at all; rather, it seemed to believe that the joint trial was mandatory. The trial court, according to Wilson, did not engage in the careful weighing of societal and pragmatic interests exemplified by the court in *Greenberger*. He concludes that such a glaring deficit requires reversal.

We agree with Wilson that the trial judge did not articulate on the record the factors he considered in postponing the trial. Thus we can find no evidence that the trial court weighed the facts and competing interests, including a consideration whether the joint trial would commence within a reasonable time.

Yet we reject Wilson's conclusion that the gaps in the record compel us to reverse the judgment. The defendant's fundamental right to a speedy trial remains paramount. But as the courts have recognized, that right is not absolute. The length of the delay in this case is indeed troubling and considerably longer than most of the analogous state cases. (See, e.g., *People v. Johnson* (1980) 26 Cal.3d 557, 561.) Yet given the reasons for the delay and both the seriousness of the charges and the complexity of the case, we find the delay was reasonable. As a result, we conclude there was good cause as required by section 1382 and a reasonable delay as set forth in section 1050.1. The scales tip heavily in favor of maintaining the joinder, and given that Wilson does not cite, and we cannot find, any evidence in the record that he was prejudiced by the delay, we will not upset the jury verdict.

B. Severance

Gordon and Wilson made motions to sever their trials from Robson's before, during, and after their joint trial. We review the denial of their motions for an abuse of discretion based on the facts before the court at the time of the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167 (*Hardy*).) Since in

this case there were multiple requests for severance based on a deteriorating state of facts, we will skip to the ultimate determinations. That is to say, we must determine whether the joinder resulted in gross unfairness amounting to a denial of due process and, if so, whether the failure to sever was harmless beyond a reasonable doubt. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 343; *United States v. Gonzalez-Torres* (9th Cir. 2002) 309 F.3d 594, 600 (*Gonzalez-Torres*).)

We turn to the record. In their motions in limine, Gordon and Wilson sought to sever their trials that of from Robson, who had cooperated with the police in extracting incriminatory statements from them in tape recorded, custodial conversations and who was planning to offer a defense of duress. The trial court denied the motions, confident that the statements could be redacted to satisfy *People v. Aranda* (1965) 63 Cal.2d 518, 530 (*Aranda*). Antagonistic defenses, according to the trial court, did not mandate severance. That was before Robson's lawyer revealed his true colors. He became, in effect, a fierce second prosecutor and in that role promised evidence adverse to Gordon and Wilson that he never delivered and reiterated the nonexistent evidence in closing argument, prompting the trial court to admonish him, to instruct the jury not to consider his comments as evidence, and to explain to the jury there was no evidence to support many of his statements during argument. Robson's lawyer's performance spawned objections, and now appellate issues, from all three defendants for reasons we

examine carefully below. But for purposes of reviewing whether the joint trial ultimately compromised Wilson's and Gordon's right to a fair trial, we must consider the strength of the independent evidence against them.

In this context, we accept at face value the criticism of Robson's lawyer. No one disputes that he promised the jury evidence he never produced and exacerbated the harm by reiterating it in closing argument. But the nonexistent evidence was trivial next to the compelling evidence produced by the prosecution. The arguments of Wilson and Gordon fail to take into account the overwhelming evidence against them.

As recounted in the statement of facts, both Tarbuskovich and Grimes gave consistent accounts of Wilson's and Gordon's participation in the robbery and ensuing murder. Tarbuskovich, who had never met either Gordon or Wilson, testified that Gordon got into the rear passenger seat of Richardson's car. He saw Wilson standing next to the driver's window, which was halfway down. He heard Gordon shout from the backseat, "You're going to play me like that?" and watched as all three defendants struck Richardson repeatedly with their fists. He testified that Wilson struck Richardson through the open window. He heard two to three gunshots and saw all three defendants run from the scene of the shooting.

Similarly, Grimes, Richardson's girlfriend, was either in the car or in close proximity throughout the robbery and shooting. She too identified Wilson and Gordon, both in photographic lineups after the shooting and at trial. Like

Tarbuskovich, she testified that it was Gordon who got into the rear passenger seat and later pulled out a gun. It was Wilson who walked over to the driver's door, reached through the window, and repeatedly tried to punch Richardson. Although Grimes ran out of the car to solicit help as soon as Gordon pulled out a gun, she was returning when she saw flashes of light and heard the gunshots.

The physical evidence and account provided by Gordon's girlfriend, Amber W., provided additional corroboration. The injuries were consistent with a shooting from the rear passenger seat. Robson voluntarily gave the arresting police officers the guns used in the incident. Amber W. testified that Gordon, Wilson, and Robson left her apartment together and later returned, sweaty and exhausted, with the loot from the robbery, including money and drugs. She watched them consult and saw Gordon and Robson divvy up the stolen property. While Gordon initially would not explain what had happened, he told her one of them was going to end up in a coffin and the other would end up in jail.

Notwithstanding this compelling eyewitness testimony and physical evidence, Gordon and Wilson insist the comments of Robson's lawyer so poisoned their trials as to amount to a gross injustice. And there is a reasonable possibility the trial court's failure to sever the trials materially affected the verdicts. We reject both propositions.

It is essential to measure the impact of Robson's lawyer's opening statement and closing argument against the evidence the

prosecution offered at trial. In his opening statement, the lawyer told the jury: "[Robson] says to them, says Hey guys, you're my friends. The two guys I came here with, are strapped. That means they're carrying firearms. So watch out for yourself." He also stated, "And about this same time, [Wilson] reaches a gun into [Robson], and says, Get 'em. And [Robson's] afraid he's gonna be shot if he doesn't do something. So he takes the .38, the pistol, the revolver, and he slaps up against the face of Alvin Richardson a couple of times real quick." Going further, he explained: "Justin Robson grabs that bag and he gets out. All within a matter of seconds of being in the car, he's out of there. . . . He hands the gun back to [Wilson], the .38 revolver, and before he'd gotten in, he had set down his bottle of brandy. . . ."

Echoing the same evidence, the lawyer argued in closing: "Mr. Wilson is carrying a .38 revolver." Robson told McGuire and Tarbuskovich, "Watch out, watch out for yourself, these other two guys." He went on, "[Wilson] reaches over with a .38 to [Robson] and he says, Pistol-whip him or you'll be shot."

As to Gordon, the lawyer argues, "[Robson] sees [Gordon] with his gun drawn and thinks he'll be shot if he doesn't, so he takes Wilson's --" Sustaining defense objections, the court instructed the jury to disregard the statements and explained there was no evidence. And the same objection and same admonition followed the lawyer's unsupported statements: "[Robson] responds by doing what [Gordon] says" and "[Gordon] tells [Robson] to hide the guns at his apartment." Undeterred,

the lawyer argued that Gordon asked Amber W. to get rid of the guns and Amber W., in fact, took them in her blue purse. Yet again an objection was made and sustained that there was no evidence to support the argument.

Following the court's denial of defendants' motions for a mistrial, they insisted on a pinpoint instruction to alleviate what they believed was the prejudice they suffered from the lawyer's argument. The court gave the following instruction: "Certain statements were made by [Robson's lawyer] during his closing argument that were objected to by one or more of the attorneys. I sustained those objections and admonished the jury to disregard those statements, as they were not supported by the evidence in this trial.

"Consistent with previous instructions, nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discussed the case but their remarks are not evidence."

The jury, therefore, was repeatedly reminded of the lawyer's transgressions, thereby minimizing any prejudice to Gordon and Wilson. Without understating or condoning this lawyer's repeated lapse of judgment, we must weigh the substance of the evidence he falsely promulgated against the untarnished evidence presented by the prosecution. Thus we have his unsupported assertion that Wilson gave Robson the gun with instructions to pistol whip Richardson and that Robson believed he would be shot once he saw Gordon pull out a gun, and he followed Gordon's orders to dispose of the murder weapon. While

those statements might have bolstered Robson's duress defense, they added little to what the jury already had heard about Wilson's and Gordon's participation.

Whatever they said or did not say to Robson, Gordon was positively identified as the shooter and Wilson was positively identified as the person standing next to the driver, striking him through the open window. When coupled with the physical evidence, their conduct following the shooting, and their incriminating custodial statements, the jury was well acquainted with their roles in the robbery and murder, and counsel's unfortunate representation that they directed Robson to participate did little, if anything, to add to the overwhelming evidence against them. Consequently, we conclude the joinder caused no gross injustice and are confident the refusal to grant a severance did not contribute to the verdict. That is to say that if there was any mistake in failing to sever in this case, it was harmless beyond a reasonable doubt. (*Gonzalez-Torres*, *supra*, 309 F.3d at p. 600.)[2]

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[2] Because we conclude the joinder was harmless, we need not address Wilson's argument that the antagonistic defenses required separate trials. Generally speaking, as the Attorney General points out, antagonistic defenses do not compel severance. (*Hardy*, *supra*, 2 Cal.4th at p. 168.)

Nor does the fact that Robson, not the prosecution, called Will McGuire to testify change our calculation. McGuire candidly admitted he was under the influence of alcohol and marijuana at the time of the shooting and could remember very little. The only damaging testimony he offered was that he might have seen Wilson pistol-whipping Richardson. As pointed out above, both Tarbuskovich and Grimes placed Wilson next to

C. The Conduct of Robson's Lawyer

1. **Ineffective Assistance Claim**

Robson blames his lawyer for his conviction. He, like his codefendants, attacks his lawyer for promising the jury he would produce evidence he failed to produce and for exacerbating the damage by reiterating the same phantom evidence during closing argument. He insists his lawyer polluted the jurors' view of his duress defense when, on several occasions, the judge had to admonish his lawyer and instruct the jury there was no evidence to support his argument.

But in Robson's view, his lawyer made an even more egregious miscalculation that deprived him of constitutionally adequate assistance of counsel. Cooperating with the police, Robson had enticed his codefendants to make self-incriminatory statements during custodial conversations that were tape recorded. During those conversations, Robson exhibited a sort of bravado, smirking and laughing in a manner that denigrated his duress defense. He faults his lawyer for failing to call the police officers to correct the false impression the jury had been given that he was unafraid and undaunted by those he claimed had compelled him to participate in the robbery. He believes it was essential the jury was informed that he was cooperating with the police during those tape-recorded

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the driver's door, striking Richardson through the window. The alleged pistol whipping was an embellishment we do not believe would have made much difference, if any at all, in the way the jury viewed Wilson.

conversations, and his light-hearted demeanor was but a ruse to entice Wilson and Gordon to confess. As a corollary, he also asserts his lawyer was inadequate for failing to object to the prosecutor's argument wherein she belittled his duress defense by calling the jury's attention to how he was laughing in their presence.

To establish ineffective assistance of counsel as protected by the United States Constitution's Sixth Amendment right to counsel, "defendant bears the burden of showing that (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's error, it is reasonably probable that the verdict would have been more favorable to defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 104 S.Ct. 2052]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 [233 Cal.Rptr. 404, 729 P.2d 839].)" (*People v. Mays* (2009) 174 Cal.App.4th 156, 171.) Tactical decisions by trial counsel, even if they prove to be unsuccessful, do not constitute ineffectiveness as embodied by the Sixth Amendment.

In denying the motion for a new trial, the court explained: "We heard from Mr. Corbin," and "[h]is tactical decisions, while they were not successful, were reasonable." The court added, "[A]ny omissions on the subject of duress which, as I said, was a very improbable defense to begin with, any errors that Mr. Corbin made did not fall below the standards of Strickland."

Robson criticizes his lawyer for promising and arguing evidence he did not produce, for failing to disabuse the jury of the wrong impression they had of his client conversing with his codefendants at a time he was acting at the behest of the police, and for failing to object to the prosecutor's argument capitalizing on the smirk he exhibited on the tape, knowing that he was a so-called agent of the police at the time. We respond to each of the three different challenges.

As for defense counsel's derelictions during opening statement and closing argument, we conclude it is not reasonably probable Robson would have obtained a more favorable result in the absence of the inappropriate argument by counsel. It is true a jury might be less than impressed by a lawyer who cites evidence the court repeatedly states has not been delivered. But as the trial court pointed out here, the lawyer was actually arguing inferences in the guise of evidence, and had he but clarified that the jury could infer these facts from the evidence presented, the problem could have been averted.

We agree with Robson that the pinpoint instruction reiterating the jury's duty to ignore his lawyer's statements could not have advanced his case. That is not to say, however, that his argument derailed his client when the evidence against Robson was overwhelming and the evidence of a duress defense anemic at best.

No one disputes that Robson pistol-whipped Richardson from the back seat of the car. And Amber W. testified he divided up the money and drugs with Gordon and Wilson. Since Robson did

not testify, there was little evidence to support his defense of duress. Tarbuskovich testified Robson had told him to be careful of his codefendants. Robson relies almost exclusively on the self-serving statements he made in a police interview wherein he referred to Wilson's and Gordon's propensity for violence and his own fear of them. But he fails to demonstrate a reasonable probability that the evidence his lawyer failed to produce would have achieved a different result. (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Robson's lawyer promised evidence that Wilson and Gordon told Robson what to do and he complied out of fear. But the jury heard evidence of what he did in Wilson's and Gordon's presence. The addition of verbal instructions would not have added materially to what the jury had already heard.

Robson argues that his lawyer's failure to disclose to the jury that he was acting on behalf of the police when his conversations with his codefendants were tape-recorded torpedoed his defense. But his lawyer stated at the hearing on the new trial motion that he and Robson made the tactical decision not to call the police officers to testify his friendliness was a ruse because of their fear of the damning testimony that would be elicited in rebuttal. The lawyer explained that during a tape-recorded interview Robson told the police he was not afraid of defendants, he had no problem being in the same interrogation room with them, and he would "beat the shit" out of them. Thus, it was the lawyer's strategic decision to withhold any inquiry into his allegiance to the police to foreclose the possibility

that his fearlessness, indeed his own aggressiveness, would be exposed to the jury and destroy his chance of proving duress. On appeal, Robson characterizes his lawyer's motivation as an "inchoate fear" and insists the officers' testimony would not have exposed Robson to damaging rebuttal.

We disagree. Robson's evidence of duress was thin, to say the least. If, as his lawyer predicted, the prosecution or one of his codefendants successfully introduced evidence that Robson exhibited he was not afraid of Wilson and Gordon and, in fact, was belligerent toward them, his duress defense would have imploded. We cannot write off the lawyer's tactical assessment merely as an "inchoate fear" with the assurance the evidence would be inadmissible on rebuttal. This lawyer faced a daunting task—to prove duress without putting Robson on the stand. Risking the introduction of evidence that he was ready to confront and assault the very people he claimed intimidated him was within the realm of tactical decisions to which an appellate court must defer. We cannot say the decision rendered his representation constitutionally inadequate.

In the same vein, we find the lawyer's reticence to challenge the prosecutor's argument demeaning his defense yet another ramification of the trial strategy he had adopted. Since we find the decision to leave unchallenged the impression Robson gave during the tape-recorded conversations a legitimate defense tactic, we cannot fault counsel for failing to object to the prosecutor's argument.

2. Gordon's Misconduct Complaint

Gordon objects to the opening statement and closing argument of Robson's counsel as improper "vouching for unproven facts" and "otherwise purveying the 'testimony' of his client." He argues the lawyer's misconduct deprived him of his right to a fair trial under the Fourteenth Amendment to the United States Constitution and his right to confront and cross-examine adverse witnesses under the Sixth Amendment. Analogizing to prosecutorial misconduct, Gordon urges us to reverse his judgment based on cocounsel misconduct.

Gordon alleges that Robson's lawyer, during opening statement, made the following representations that he failed to prove: that Gordon and Wilson were carrying, respectively, the .380 semiautomatic and the .38 revolver; that Robson told people his friends were "strapped"; that Gordon pulled out a gun and instructed Richardson to hand over the "weed"; that Gordon, while "hard-staring" Robson, ordered him to get rid of the guns; that Gordon handed Amber W. the .380 to put in her blue purse; and that Amber W. stated she should not have touched the gun. The lawyer conveyed the impression that his client would testify, and indeed, the trial court later reported the lawyer had led everyone to believe Robson would substantiate the duress defense.

The trial court found that there were two statements that were never proven: "that Mr. Gordon told Mr. Robson to get rid of the guns," and "that Mr. Gordon gave the .380 to Amber [W.]." Gordon argues the trial court circumscribed the

problem of factual representations too narrowly and that, at this point in the proceedings, there was no evidence that Amber W. owned the blue purse in which the .380 semiautomatic gun was found in Robson's apartment or that Amber W. ever said she was sorry she had touched the gun. He maintains that the lawyer cloaked inferences that might have been drawn as facts his client reported as a percipient witness. Thus, the vice was not only in the areas in which no evidence was forthcoming, but in the "prestige" the statements obtained when reported by a lawyer and presumably coming from his client. In Gordon's view, he was thereby denied his right both to a fair trial and to confront and cross-examine the witness, Robson, who testified clandestinely through his lawyer.

Gordon exaggerates the damage inflicted by cocounsel's indiscretions and ignores the ameliorative effect of the trial court's rulings and admonitions. The court sustained repeated objections to cocounsel's argument and expressly reminded the jury that cocounsel had made statements not supported by the evidence. Consequently, the jury was not left with any false impression or false "prestige" about unsubstantiated evidence.

While it is true that Robson's lawyer tried to sneak in evidence that Gordon solicited Robson's participation, that evidence added little value to what the jury already had heard about his role as the shooter. In short, his solicitation of Robson may have been relevant to Robson's duress defense, but it paled in significance to Grimes's and Tarbuskovich's testimony that it was Gordon who was seated in the rear passenger seat and

who pulled the gun. The debate as to whether Amber W. owned the blue purse in which the gun was found in Robson's apartment again is a minor distraction. Whether she owned the purse or not, or whether Gordon told her to conceal the gun, again was more relevant to Amber W.'s culpability but had little bearing on Gordon's pivotal role as the shooter.

In passing, we must express our disagreement with Gordon's assessment of the strength of the identification testimony. He emphasizes that Grimes called him Jemiere Wilson, Wilson's brother, and there was some dispute over the kind of hat or beanie he was wearing. Both Grimes and Tarbuskovich identified Gordon as the shooter in a photographic lineup immediately following the shooting and at trial. Grimes explained that she made the assumption the shooter was Wilson's brother because Gordon kept referring to him as his "bro." The identifications, coupled with Amber W.'s testimony about Gordon's postshooting behavior and statements, constitute compelling evidence that he shot and killed Alvin Richardson.

It may be that in another case a cocounsel's misconduct might deprive a codefendant of a fair trial and could be analogized to prosecutorial misconduct. But that is not the case here. As mentioned above, cocounsel's representation of inferences as facts was unfortunate and gave rise to the trial court's speculation about the lawyer's motive. Nevertheless, based on a review of the entire record in this case, it is clear that the indiscretions did not sabotage the fairness of the trial in light of the timely objections raised by the other

attorneys,the admonitions promptly delivered by the trial court, and the pinpoint instruction the court gave to reinforce the repeated admonitions it had given. More importantly, the inferences cloaked as facts were not of the quality or quantity to compromise the integrity of the verdict.

D. Admissibility of Prior Bad Acts, Gang Affiliation, Etc.

Robson asserts yet another challenge caused by the joinder—the admissibility of evidence to support his duress defense, evidence that would substantially prejudice his codefendants. The Attorney General gives short shrift to the argument, urging us to find that Robson forfeited the issue by failing to obtain an express ruling on the record and by later abandoning it.

Robson filed motions in limine to admit evidence that Gordon and Wilson were members of the "MOB street gang"; that Robson and his girlfriend had been intimidated when Gordon and Wilson barged into their apartment and made sexual advances toward Robson's girlfriend; that Gordon had threatened Robson over a $5 gambling debt, which Gordon incurred in a game of dice; and that Gordon had committed another robbery two nights earlier at the same liquor store. Robson concedes the record does not reflect a dispositive ruling. The court did state on the record that it believed a statement in which Robson characterized his codefendants as "killers" should be excluded because "[i]t would be pretty difficult in my view, in a special circumstance murder case, to give a limiting instruction to the jury that they could only consider it for state of mind or what happened next." Even the prosecutor urged the court to exclude

the gang evidence because it was not a gang-related shooting. No evidence of any of Gordon's or Wilson's prior bad acts, felony records, or gang affiliation was admitted at trial. The Attorney General would have us assume Robson abandoned his request.[3]

On this record, we will not imply either forfeiture or abandonment. The issue was raised in the motions in limine, and the court stated its disposition to deny the request. Although we cannot discern whether a more definitive ruling was made in chambers as suggested by Robson on appeal, or whether Robson's lawyer believed the court's oral disenchantment represented a ruling, we will not attempt to evade the difficult evaluation of the merits based on the mere failure to lock in a ruling it was obvious the court had made. Moreover, as Robson points out, the court did expressly exclude two statements indicative of its inclination to sanitize Gordon and Wilson: Robson told others that night that "these guys are killers," and prior to the shooting he warned that they were "strapped" and therefore dangerous.

Thus, the joinder put the trial court in a difficult position. Without addressing the merits of each piece of evidence or the countervailing factors that might favor

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[3] As an aside, we point out that Robson does not argue on appeal that his case should have been severed. Nor did he pursue a severance vigorously below as did his codefendants. Had the case been severed or separate juries convened, the trial court might have allowed the introduction of the evidence in support of the duress defense without prejudice to his codefendant.

exclusion as to one, but not another, piece of evidence, we again conclude that the error, if any, was harmless beyond a reasonable doubt. We therefore must carefully examine the evidence of duress. There was very little.

First and foremost, defendant Robson, apparently to the court and cocounsel's surprise, chose not to testify. Hence there was no direct evidence of his state of mind.

Second, there was no evidence that he exhibited any fear or reticence to accompany Gordon and Wilson before, during, or after the shooting. None of the percipient witnesses testified that he looked scared, acted intimidated, hesitated, or in any manner appeared apprehensive about participating in the robbery.

Moreover, Robson had a preexisting relationship with his two codefendants. He had been friends with Wilson since the third grade, and he had known Gordon for about three years. They lived in the same apartment complex at the time of the shooting and apparently spent considerable time together socializing. No one testified that Robson had expressed that he felt any compulsion to maintain the relationship; nor did he express or exhibit signs of stress in their presence. Rather, he had spent the day of the shooting swimming, watching movies, and gambling with his two friends.

Nevertheless, he disavows personal responsibility for his participation in the robbery, contending he was afraid of the two of them because they were gang members with a propensity for violence. He urges us to reverse his conviction because, he insists, the jurors might have believed he was acting under

duress if they had known that he knew his codefendants were violent gang members. We disagree.

Mere gang membership would not give rise to a duress defense. Nor would the fact he had seen Gordon rob before or that Gordon had given him a menacing look. Robson fails to appreciate that he is missing an essential link in establishing duress—that his will was overcome by fear and intimidation. There is no question he chose to associate with a rough crowd, a crowd that was intimately familiar with guns and drugs. But the evidence suggested that he was inoculated from any fear of associating with friends like Gordon and Wilson. Simply put, we do not believe that the evidence of their gang affiliation or any of the prior bad acts he identifies would have convinced a jury that he was under duress when he entered the car and pistol-whipped Richardson. Thus, even if the trial court erred by failing to admit the evidence, we conclude the error was harmless beyond a reasonable doubt.

E. Exculpatory Evidence

1. Wilson

Wilson contends that because the redacted portions of his tape-recorded conversation with Robson gave a false impression of his complicity, the trial court erroneously excluded additional excerpts to provide a context for the redacted portion the prosecution played for the jury. The additional material was necessary, in Wilson's view, for the jury to understand that when he said, "And I was carrying that gun because I was going to buy some weed," he was not using the

personal pronoun "I" but was referring to Gordon, who was called "Little I." The Attorney General points out that the trial court enjoys broad discretion in assessing the admissibility of evidence. (*People v. Anderson* (2001) 25 Cal.4th 543, 591.)

The scope of appellate review of the trial court's exercise of discretion is quite limited. "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see *People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

The trial court, with the assistance of the prosecutor and defense counsel, engaged in a laborious process of excising the tape-recorded conversations of "all parts of the extrajudicial statements implicating any codefendants." (*Aranda*, *supra*, 63 Cal.2d at p. 530; see *Bruton v. United States* (1968) 391 U.S. 123, 143 [20 L.Ed.2d 476] (*Bruton*) (dis. opn. of White, J.).) During the prosecution's case-in-chief, Wilson's lawyer again challenged the redaction. He argued vehemently that his client was not using the personal pronoun "I," but was referring to his codefendant's nickname, when he said, ". . . I was carrying that gun because I was going to buy some weed." He offered to play additional segments of the tape or to have one of the police officers who was present during the recording testify. But he

insisted the jury needed additional context to understand the true referent.

Having carefully reviewed the transcript of the long debate over the nuances of "I," we conclude the trial court carefully exercised its discretion. Throughout the hearing the court expressed its concern about the poor quality of the tape and stated it was of such a poor quality it was of little probative value. The court reminded counsel the jury would have the redacted tape to listen to again during deliberations and encouraged him to urge the jury to draw the same inference that he did; that is, that the "I" referred to Ira Gordon. But the judge believed the poor quality of the tape made the exercise worthless. Moreover, he rejected defense counsel's request to allow a police officer to testify, finding that any testimony by the police officer as to what Wilson meant when he used "I" would be purely speculative.

We cannot say that the trial court's patient and thorough consideration of the issue constituted an abuse of discretion, even in the context of a criminal defendant's right to introduce any competent, relevant, and material evidence in support of his defense (*People v. Taylor* (1980) 112 Cal.App.3d 348, 364-365.) and his privilege against self-incrimination (*Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106]). The judge certainly did not preclude Wilson from arguing the reasonable inference that he was referring to his codefendant's nickname. We do not believe that the excised portions of the recording would have put such a different spin on his meaning than the

jury could have derived from the redacted version, carefully crafted to protect the codefendants. We recognize the delicacy of the trial court's challenge to assure that each of the jointly tried defendants received a fair trial and conclude that the court did not abuse its discretion by limiting the admissibility of additional contextual statements that, while they might have bolstered Wilson's argument, would have compromised his codefendant, Gordon.

2. Robson

Robson raises a similar complaint. He, too, contends the trial court abused its discretion and denied him a fair trial by allowing the prosecution's redaction of the tape and refusing to allow him to introduce exculpatory statements that had been excised. In Robson's case, he sought to include statements either he or Wilson made implicating Gordon as the person who shot Richardson, or suggesting that Gordon was acting on his own in shooting Richardson. The prosecutor argued that the redacted transcripts "tell pretty much the whole picture of what happened and the roles of each one of these three defendants," that they were not misleading, and that they complied with *Aranda*/*Bruton*.

Again the court gave careful consideration to the request to introduce more of the statements from the tapes. The court stated that the tapes revealed that Robson was willing and eager to admit he had pistol-whipped Richardson and that all three defendants were attempting to get their stories straight. But the court concluded the redactions were not unfair to Robson because it did not believe the jury would be able to discern

each individual's involvement in the robbery/murder from the composite tapes, other than the fact they were all at the scene.

We agree with the Attorney General that the statements Robson sought to introduce were not exculpatory and they would not have exonerated him. The prosecution's theory was felony murder. The felony-murder rule holds those who commit specified felonies strictly responsible for any killing committed by a cofelon during the commission or attempted commission of the felony, whether the killing is intentional, negligent, or accidental. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197 (*Cavitt*).) Thus the fact that Gordon was the shooter did not exonerate Robson or Wilson.

Robson argues, however, that he wanted to introduce statements, not only that Gordon was the shooter, but also that Robson and Wilson did not know what Gordon was trying to do when he hopped in the car and Wilson asked the rhetorical question, "Why did he shoot that nigger?" Robson maintains that those statements demonstrated Gordon was "on a frolic of his own." He believes those statements would have taken him beyond the reach of the felony-murder rule. Not so.

It is true that there must be a nexus between the felony and the killing. Some deaths, therefore, evade the felony murder rule because they are "so far outside the ambit of the plan of the felony and its execution as to be unrelated to them." (*Cavitt*, *supra*, 33 Cal.4th at p. 199.) But Robson's and Gordon's statements do not demonstrate the kind of attenuation necessary to fall outside the ambit of the rule. They merely

suggest that the shooting exceeded their own expectations of what would occur during a robbery. The Supreme Court has made clear, however, that cofelons remain liable for murder even if the killing is unintentional, negligent, or accidental. (*Id.* at p. 197.)

As a consequence, we find the court did not abuse its discretion or deprive Robson of a fair trial by disallowing evidence that would implicate his codefendant when that very evidence would not exonerate him under the wide-ranging consequences of participating in a robbery that results in death. There was no error.

II

Instructional Error

A. Felony Murder

The trial court instructed the jury on the general principles of law regarding robbery and felony murder, including the standardized instruction CALCRIM No. 540B. Following the basic principles enunciated by the Supreme Court in *Cavitt*, *supra*, 33 Cal.4th 187, CALCRIM No. 540B, as given to the jury, provides in pertinent part: "A defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. . . .

"To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:

"1. The defendant committed or aided and abetted, the robbery;

"2. The defendant intended to commit, or intended to aid and abet the perpetrator in committing, the robbery;

"3. If the defendant did not personally commit the robbery, then a perpetrator, whom the defendant was aiding and abetting, personally committed the robbery;

"AND

"4. While committing the robbery, the perpetrator did an act that caused the death of another person;

"5. There was a logical connection between the act causing the death and the robbery. The connection between the fatal act and the robbery must involve more than just their occurrence at the same time and place.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent."

Wilson and Robson do not challenge the felony-murder instructions given, but they do challenge what might have been given and was not. That is to say, they contend the trial court failed to give a sua sponte instruction further explaining, or pinpointing, the concept that an aider and abettor is not liable under the felony-murder rule for a killing committed for a purpose other than in furtherance of the robbery. They argue that Gordon's comment to Amber W. that either he or Richardson was going to be put in a coffin constituted sufficient evidence the shooting was based on a preexisting vendetta and triggered the trial court's duty to clarify and expand on the principles set forth in CALCRIM No. 540B.

We disagree. A trial court must instruct the jury on the general principles of law that are closely and openly connected with the facts and essential for the jury's understanding of the case. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) Beyond that, it is incumbent upon a defendant to request clarifying or amplifying instructions peculiar to the facts of his case. (*People v. Garrison* (1989) 47 Cal.3d 746, 791.) Here the trial court properly explained the elements of felony murder, including the element that there must be a nexus, or a logical connection, between the robbery and the murder, and that the connection must be more than the coincidence of time and place. If, as Wilson and Robson now contend, the jury should have been further instructed on the nuances of the requisite connection, they should have requested the instructions they now find essential to their defense. The court had no sua sponte obligation to make up for their deficiency.

B. CALCRIM No. 362

The California Supreme Court consistently has rejected the same challenges to CALCRIM No. 362, and its earlier counterpart, CALJIC No. 2.03, on consciousness of guilt, which Wilson raises here. (See, e.g., *People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1057; *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) We, of course, are not at liberty to reject a holding of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

CALCRIM No. 362, as given to the jury, states: "If you find that any defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

During their taped conversation, Wilson told Robson to "stick to this story." The prefabricated story included Wilson's saying, "we going leave [*sic*] the robbing part out" and "We can say we went to the store to get some weed." He went on to give Robson the details of their "story": "We went to the store. I used the white boy to, um, call Alvin. I was going to buy some weed from . . . ." "And I was going to buy some weed. So me and you about to buy some weed, basically. But I would have had the money. I was doing a transaction, and you were just sitting in the back seat."

Wilson puts a totally incredible spin on his statements, now contending they were explanatory in nature and consistent with a general denial of guilt. He was certainly welcome to make such a far-fetched argument to the jury. From our vantage point, his statements constitute more than ample evidence to necessitate the consciousness of guilt instruction contained in CALCRIM No. 362 and blessed by the Supreme Court.

C. CALCRIM No. 220

Gordon targets the newest iteration of the reasonable doubt instruction set forth at CALCRIM No. 220, wherein the definition of proof beyond a reasonable doubt, which was given here, is "proof that leaves you with an abiding conviction that the charge is true." Gordon complains that the simplicity of CALCRIM No. 220, unlike its earlier, more sophisticated predecessors, CALJIC No. 22 and CALJIC No. 2.90, as well as section 1096, eliminates the kind of subjective certitude of the truth of the charge necessary for a proper application of the reasonable doubt standard of proof. We dismissed this argument in *People v. Zepeda* (2008) 167 Cal.App.4th 25 (*Zepeda*) as "border[ing] on the frivolous" and as "mere semantics" (*id.* at p. 30).

Gordon would have us forsake our holding in *Zepeda* and adopt the dicta expressed by the federal district court in *Stoltie v. California* (C.D.Cal. 2007) 501 F.Supp.2d 1252 (*Stoltie I*), wherein the court applauded the improvements to the reasonable doubt instruction embodied in CALCRIM No. 220 but concluded it does not adequately convey to the jurors that they must be subjectively certain of a defendant's guilt (*Stoltie I*, at p. 1261). According to Gordon, *Stoltie I* recognizes there is a vast difference between "feel[ing]" an abiding conviction and "proof that leaves you with an abiding conviction." We are not prepared to reject *Zepeda* based on the lower court's dicta in *Stoltie I* that the Ninth Circuit Court of Appeals was unwilling

to endorse. (*Stoltie v. Tilton* (9th Cir. 2008) 538 F.3d 1296 (*Stoltie II*).)

In affirming the grant of habeas corpus in *Stoltie I*, the Ninth Circuit Court of Appeals adopted the opinion of the district court, with the exception of section III.C., wherein the court had offered its views on reforming the reasonable doubt instruction. (*Stoltie II*, *supra*, 538 F.3d 1296.) It was in this section the court had offered its observations about CALCRIM No. 220. The Ninth Circuit did not incorporate these views into its opinion, stating, "As the state acknowledged at oral argument, even the state appellate court misunderstood the confused and confusing explanation of reasonable doubt provided to the jury by the trial judge. This error led it to apply in an unreasonable manner clearly established Supreme Court law regarding reasonable doubt." (*Stoltie II*, *supra*, 538 F.3d 1296.) *Stoltie I*, therefore, provides no justification for abandoning *Zepeda*.

III

Custodial Interrogation

Wilson contends incriminating statements he made to Robson while they were in custody should have been suppressed because his good friend had been acting as a police agent and in that capacity elicited a coerced confession in violation of Wilson's rights under the Fifth and Fourteenth Amendments to the United States Constitution. He encourages us to employ Sixth Amendment jurisprudence to overcome the well-accepted barriers to his theory under the Fifth Amendment. We reject his argument that

there is no meaningful distinction between the Sixth Amendment rights addressed in *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246] (*Massiah*) and the Fifth Amendment rights discussed in *Rhode Island v. Innis* (1980) 446 U.S. 291, 297 [64 L.Ed.2d 297].

Wilson recognizes that Robson's zeal in eliciting incriminating statements from him, even at the government's behest, does not violate the right against self-incrimination protected by the Fifth Amendment. (*Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [110 L.Ed.2d 243].) "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. [Citations.] When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking." (*Id.* at p. 296.) The same rationale applies when a suspect thinks he is talking to a friend or lover. (*People v. Webb* (1993) 6 Cal.4th 494, 526 (*Webb*).) As in *Webb*, Wilson's "tape-recorded statements were completely voluntary and compulsion-free." (*Ibid.*)

Yet Wilson would have us blur the Fifth Amendment right against self-incrimination with the Sixth Amendment right to counsel by focusing exclusively on whether police conduct is likely to elicit incriminating statements. But his focus is misplaced. The focus is not on the objective to be achieved, but on the nature of the right to be protected. The Sixth

Amendment right to counsel, as discussed in *Massiah*, *supra*, 377 U.S. 201, does not attach until the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (*Webb*, *supra*, 6 Cal.4th at p. 526, internal quotation marks omitted.) Since Wilson had not been formally charged or arraigned at the time his conversations with his friend were tape-recorded, he was not deprived of his Sixth Amendment right to counsel. As a result, Wilson was not denied his rights under either the Fifth or Sixth Amendment, and his attempt to blur the two fails.

IV

Support Person

Gordon contends he was denied his right of confrontation by the presence of a support person seated next to Amber W., a witness for the prosecution, as allowed by section 868.5. The Fifth District Court of Appeal rejected a wholesale constitutional challenge to section 868.5 but recognized a defendant's right to due process could be jeopardized in a particular case if "the support person does anything that the jury could see that might interject an influence on the victim-witness or the jury such as crying, nodding the head, hand motions, etc." (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1732.)

Wilson does not argue that the victim advocate in this case did anything to influence Amber W.'s testimony. Nor does he challenge the justification for the support person's presence in

the courtroom, presumably based on Amber W.'s assertion that Gordon had made threatening phone calls to her. Rather, he suggests there was no showing of a necessity to have the support person seated next to Amber W. as she testified instead of sitting in the courtroom. He speculates the close proximity of the support person to the witness deprived him of his right to confrontation.

His speculation is nothing more than a disguised challenge to the constitutionality of the statute. Here he fails to make a particularized showing that the support person in some way inhibited or hampered his ability to cross-examine Amber W. Moreover, she was cross-examined by three defense attorneys over a day and a half of testimony, and not once did any of the lawyers complain the support person was interfering with their examinations or was bolstering her testimony. In the absence of some showing the support person interfered or influenced the witness, there is no constitutional impediment to the support that was offered this intimidated witness.

V

Revocation Fine

The Attorney General concedes the trial court erred by imposing a $200 parole revocation fine on all three defendants, even though only Wilson raises the issue on appeal. A fine is not applicable where, as here, a defendant's sentence includes a term of life without the possibility of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185.)

DISPOSITION

The parole revocation fines are stricken from each judgment. The trial court is directed to correct the abstracts of judgment accordingly and to forward certified copies of each to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

RAYE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.